[Dated September 12, 1992]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 86-1840

JIMMY WAYNE JEFFERS,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
Petitioner-Appellant,	)	COURT FOR THE DISTRICT
	)	OF ARIZONA,
-vs-	)	NO. CIV-85-945-TUC-ACM
	)	
SAMUEL A. LEWIS, et al.,	)	PETITION FOR REHEARING
	)	WITH SUGGESTION FOR
Respondents-Appellees.	)	REHEARING EN BANC
	)	

Respondents-Appellees, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, ask this Court to rehear its decision filed August 31, 1992, and suggest that a rehearing en banc would be appropriate. Reasons in support of this request are set forth in the following Memorandum of Points and Authorities.

DATED this 12th day of September, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Undersigned counsel believes that a rehearing is appropriate because in its decision the majority overlooked material points of fact or law in its analysis of the review performed by the Arizona courts and materially misrepresented the position taken by Arizona Attorney General in the oral argument before this Court. Undersigned counsel also believes that this Court failed to consider Clark v. Ricketts, 958 F.2d 851 (9th Cir. 1991), a case decided after the submission of this case and in conflict with the majority's decision.

Undersigned counsel believes that a hearing en banc is appropriate because of the conflict with Clark v. Ricketts, the exceptional importance of the question regarding the proper presumption to be afforded state court's findings, and the conflict existing with the majority opinion.

II. Argument

A. The majority opinion directly conflicts with another panel's decision in **Clark v. Ricketts** and abrogates the presumption that state-court convictions and sentences are presumed correct unless clearly shown otherwise.

The majority opinion states that it cannot allow Jeffers' penalty to stand because the trial court failed to "consider adequately" the mitigating evidence, and Arizona Supreme Court failed in "carefully reweighing" the mitigation and aggravation in its independent review. Slip op. at 8, 16. Both conclusions conflict with Clark v. Ricketts. The majority opinion reached its conclusion regarding the trial court error by stating:

> Because the sentencing court failed to discuss the evidence of duress, provocation, intoxication, and heroin addiction as nonstatutory mitigating circumstances, and failed to discuss the sodium amytal evidence at all, the record does not permit this

> court to conclude that the evidence was considered adequately. "We are not permitted to presume that because evidence was admitted before the factfinder, it was necessarily given consideration." Smith, 914 F.2d at 1166. Because there is a risk that mitigating evidence in this case was not fully considered, Jeffers's sentence of death cannot stand. Smith, 914 F.2d at 1167-69.

Slip op. at 8. This very contention was rejected by a unanimous panel in Clark:

> The due process clause does not require that the sentencing court exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant. See, e.g., Parker [v. Dugger], 111 S.Ct. [731], 736 (statement by the sentencing court that it considered all mitigating evidence adequate).

958 F.2d at 858 (emphasis added, footnote omitted). In fact, the Clark opinion rejects the very portion of the Smith v. McCormick opinion cited to by the majority. Clark, 958 F.2d at 858 n.5. The majority opinion in this case cites to the Smith opinion and claims that it "dictated" the result reached. Another panel of this Court has explicitly repudiated the Smith holding after Parker v. Dugger. This discrepancy cannot be left unresolved.[1]

Under the holding in Clark, if the state court states it has considered all evidence, a federal court must assume that the evidence was considered. Clark, 958 F.2d at 858-59, citing Parker, 111 S. Ct. at 736 ("We must

---

1. The failure of the majority to recognize and resolve the conflict cannot be faulted to the Arizona Attorney General as Clark was specifically cited to the court as supplemental authority for the proposition proffered in this petition. (See "Notice of Supplemental Authority," filed Aug. 27, 1991.)

assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did."). In the instant case, the trial court specifically indicated he was considering "any possible mitigating circumstance." (R.T. of July 10, 1980, at 216.) Under Clark, that was all due process required him to do. See also Clemons v. Mississippi, 110 S. Ct. 1441, 1449 (1990). The majority holding on this point is inconsistent with Clark, Parker, and Clemons, and should be reversed.

The majority's holding regarding the Arizona Supreme Court's reweighing is also inconsistent with Clark and Richmond v. Lewis, 945 F.2d 1473 (9th Cir.1990). In Clark, on appeal the Arizona Supreme Court vacated one aggravating factor (grave risk of death) and modified another aggravating factor after it found no evidence to support a finding of cruelty in cruel, heinous and depraved. State v. Clark, 126 Ariz. 428, 435-36, 616 P.2d 888, 895-96, cert. denied, 449 U.S. 1067 (1980). Without discussing the mitigation in detail, the Arizona Supreme Court then stated, "From our independent review of the evidence in capital cases, we conclude that the aggravating circumstances described before have been established and the mitigating circumstances are not sufficiently substantial to call for leniency; therefore, the judgment and sentence are affirmed as to all counts." 126 Ariz. at 437, 616 P.2d at 897. This Court rejected Clark's claim that mitigation was not considered and affirmed. Clark, 958 F.2d at 858-59.

In Richmond, a majority of the Arizona Supreme Court vacated the cruel, heinous and depraved aggravating circumstance found by the trial court. Richmond v. Lewis, 948 F.2d 1473, 1485 n.9. The state supreme court, in its independent review, nonetheless affirmed the death sentence. State v. Richmond, 136 Ariz. 312, 320-21, 666 P.2d 57, 65-66 (1983).

This Court found no error. This Court noted that judges are "presumed to know the law and to apply it correctly in making their decisions." Richmond, 948 F.2d at 1484 (citing Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990)). This Court rejected Richmond's claim that the case should be returned for "plenary reweighing" where the record supports one or more aggravating circumstances and the court found "no mitigating circumstances sufficiently substantial to call for leniency." Richmond, 948 F.2d at 1489.

Under Richmond and Clark, a habeas court presumes the Arizona Supreme Court knows the law and correctly applied it in rendering its decision,[2] and assumes that all mitigation was considered in weighing aggravation and mitigation if the state court said it did. Both Richmond and Clark were decided after Smith, and neither panel felt compelled to find that Smith dictated a different conclusion.

The statements by the Arizona Supreme Court on independent review that it found no mitigating circumstances to warrant leniency was sufficient in Richmond and Clark. The majority opinion in this case holds that such language is not sufficient. The majority holding conflicts with the holdings of those courts, and the holding in Parker v. Dugger, 111 S. Ct. at 736. This Court should reverse the holding of the majority opinion.

---

2. In Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992), another panel of this Court again reiterated that a habeas court presumes that a state appellate court has carried out its review obligations "even when [the court] does not expressly indicate in its opinion that it has done so." 966 F.2d at 1569.

B. The majority opinion violated a basic fundamental principle of habeas review by engaging in "plain error" review and reversing a state court sentence based on a claim not presented on appeal to this Court.

In the supplemental brief after remand from the United States Supreme Court, Jeffers raised six claims of error left to be resolved. Claim 1 was that the trial court "failed to consider all mitigating circumstances and failed to make appropriate findings." In this section of the brief, Jeffers challenged whether the trial court considered pretrial plea negotiations, sodium amytal testing, and the disparate treatment afforded Doris Van Der Veer. No where did Jeffers contend that the trial court failed to consider his intoxication evidence as "non-statutory." (Supplemental Brief at 2-10.) Jeffers did not cite to or argue from Smith v. McCormick in either the opening or reply supplemental briefs.

In claim 2, Jeffers claimed that under "Arizona law, Jeffers' case must be remanded to the trial court for a redetermination of the appropriate sentence under the Arizona death penalty statute." (Supplemental Brief at 17-18.) Jeffers did not make any claim that the Arizona Supreme Court failed to consider mitigation in its reweighing, only that because the Arizona Supreme Court found mitigation it was required under state law to remand. (Supplemental Brief at 11-18; Supplemental Reply Brief at 8.)

At oral argument, this Court raised on its own the issues of whether the trial court considered Jeffers' intoxication evidence as nonstatutory mitigation and the adequacy of the Arizona Supreme Court's opinion and reversed on that basis. The action of this Court is contrary to law, and must be reversed.

On habeas corpus review, federal courts cannot review the state court record for "plain error," the very action this Court took in this case. Engle

v. Isaac, 456 U.S. 107, 134-35 (1982); United States v. Frady, 456 U.S. 152, 165-66 (1982); Henderson v. Kibbe, 431 U.S. 145, 154 (1977). A "plain error" standard is inappropriate for habeas corpus review:

> Federal habeas challenges to state convictions . . . entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is "greater than the showing required to establish plain error on direct appeal."

Engle, 456 U.S. at 134-35, quoting Henderson, 431 U.S. at 154. A collateral habeas challenge does not serve the same interest as a direct appeal. Frady, 456 U.S. at 165.

Applying a mere "plain error" standard on collateral review violates the State of Arizona's "strong interest in the finality of judgments." Henderson, 431 U.S. at 154 n.13. A state court's final judgment that a person is guilty of a crime and must be appropriately punished should "command respect":

> Once a defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted. . . . Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks.

Frady, 456 U.S. at 164-65.

Since 1983, when Jeffers first filed his petition for writ of habeas corpus, the state court judgments that he is guilty of first-degree murder have not commanded respect. The 9-year delay in the State of Arizona's ability to enforce its duly enacted criminal law diminishes the sovereignty of Arizona: "[T]he power of a state to pass laws means little if the state cannot enforce them" McClesky v. Zant, 111 S. Ct. 1454, 1469 (1991). Moreover, the extreme delay attendant on federal habeas review makes any

resentencing of a state prisoner very difficult, if not impossible. Henderson, 431 U.S. at 154 n.13. Because the reversal of a state prisioner's conviction or sentence on collateral review has serious consequences, a federal court must apply a standard of error higher than mere "plain error." This Court erred in applying the "plain error" standard to Jeffers' case and finding that Jeffers' death sentence should be reversed on grounds raised on its own.

The finality of the punishment imposed on Jeffers, death, does not change the standard to be used on review. Although the United States Constitution places special constraints on the procedures to convict and sentence capital defendants, once the trial stage of capital adjudication is completed, no different, especially stringent, procedures or laws apply on appeal or collateral review. Murray v. Giarratano, 492 U.S. 1, 8-9 (1989); Smith v. Murray, 477 U.S. 527, 538-39 (1986); Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring in part). "[W]e have similarly refused to hold that the fact that a death sentence has been imposed requires a different standard of review in federal habeas corpus." Giarratano, 492 U.S. at 9. Because the standard that applies in non-capital cases applies equally to capital cases, and because this Court applied the incorrect "plain error" standard in reviewing Jeffers' case, this Court erred in setting aside Jeffers' death sentence on issues that Jeffers did

. . . .

. . . .

not present.[3] This Court should therefore grant rehearing.

C. This Court erred in reversing Jeffers' death sentence for the state court's failure to consider certain evidence as "nonstatutory" mitigation that Jeffers' never proffered or argued as nonstatutory mitigation, because state courts have no affirmative duty to examine the state court record sua sponte for mitigation.

This Court should reconsider its decision in this case because, in holding that the state courts failed to "carefully" consider evidence as "nonstatutory" mitigation when Jeffers never proffered or argued such, this Court has now imposed an "affirmative duty" on state courts to search the record for mitigation and to specify any and all potential mitigation, argued by the defendant or not. The United States Constitution does not support such a duty. The federal constitution requires that a state not prevent capital defendant from offering, or a state court from considering, any relevant evidence in mitigation. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 608, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Nothing, however, requires a state court to affirmatively scour the record for mitigating evidence that the capital defendant does not offer or argue as mitigation.

---

3. Jeffers' petition before the district court likewise did not contend that the trial court failed to consider his drug intoxication as "nonstatutory" or that the Arizona Supreme Court failed to consider mitigation in its independent reweighing. Jeffers v. Ricketts, 627 F. Supp. 1334, 1357-59 (D. Ariz. 1986). Therefore, Jeffers would have been precluded from raising these issues on appeal. Powell v. Spalding, 679 F.2d 163, 167 (9th Cir. 1982). Likewise, Jeffers never presented these claims in state court, therefore he was precluded from presenting it in a federal habeas corpus petition. 28 U.S.C. § 2254; Castille v. Peoples, 109 S. Ct. 1056, 1059-60 (1989).

No federal court, until the majority in this case, has imposed such a duty on state courts. Such a holding is contrary to that body of *constitutional* law finding that a capital defendant may waive presentation of mitigating evidence. Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 n.4 (1990); Singleton v. Lockhart, 962 F.2d 1315, 1321 (8th Cir. 1992).

Furthermore, the imposition of such a duty injects a quantum of "gamesmenship" into federal habeas review, a system already fraught with such practices. The majority's decision allows a capital defendant to "lie low" at sentencing by not offering or arguing any circumstances in mitigation, and then, upon appellate or collateral review, point out a single fact that the state trial court did not specifically note that it had considered in mitigation. Capital defendants can repeat this process after each new sentencing ad infinitum, delaying his day of reckoning. Such a holding is absurd and must be rejected.[4]

D. This Court's opinion materially misrepresented the position taken by the Arizona Attorney General on **Smith v. McCormick**.

In the majority opinion, this Court claims that the Arizona Attorney General "acknowledged that this case is 'on all fours' with Smith v. McCormick." Slip op. at 8. The point of law that this Court ascribed was that the trial court failed to consider mitigating evidence as nonstatutory after rejecting that it constituted statutory mitigation. A cursory review of the transcripts reveals the statement is incorrect. (See Transcripts of Oral Argument Attached as Appendix A.) At the oral argument, Judge Pregerson asked:

---

4. For the reasons discussed below, such an "affirmative duty" holding also violates the Teague new rule prohibition.

CJJ: Well, this, this case, the posture of this case before us is pretty much on all fours with Smith versus McCormick, isn't it?

PM: Yes, your honor. I would say in the sense that the trial court did not specifically list the non-statutory mitigating circumstances. I would disagree with that analysis regarding what was considered because it was, I believe the trial court did properly consider that which was argued to him.

(Appendix A at 31.) Clearly, the only concession that Smith was "on all fours" with this case was limited to whether or not the trial court specifically listed all mitigating factors. The assistant attorney general conceded the trial court had not specifically detailed nonstatutory evidence, but argued that the court had considered the evidence. (Appendix A at 20.) In addressing how the Arizona Supreme Court viewed the evidence, the assistant attorney general specifically contended that the Arizona Supreme Court did consider the evidence as both statutory and nonstatutory. (Appendix A at 20-21.) Those portions of this Court's opinion that are based on a supposed concession by the Arizona Attorney General are simply wrong. The assistant attorney general specifically argued Smith was inconsistent with Clemons (Appendix A at 29-30); a new rule under Teague (id. at 30-31); and that Smith was complied with in this case. (Id. at 31.) This Court should reconsider its opinion on this point.

E. The proposition of law that a trial court or a state supreme court on independent review must state with specificity all nonstatutory mitigation, argued by the defendant or not, is clearly a new rule of law and its application in this case violates the principle of **Teague**.

As a threshold matter, a federal court always determines first if the relief the habeas corpus petitioner seeks would create a "new rule." Penry

v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 2944 (1989) (citing Teague v. Lane, 109 S. Ct. at 1069). A state prisoner seeking habeas corpus relief in federal court cannot benefit from a "new rule." Id. A "new rule" arises when the relief sought "breaks new ground or imposes a new obligation on the states." Penry, 109 S. Ct. at 2944; Teague, 109 S. Ct. at 1070. A "new rule" is imposed if "the result was not dictated by precedent" existing at the time the prisoner's conviction became final. Penry, 109 S. Ct. at 2944 (emphasis in original); Teague, 109 S. Ct. at 1070. The rationales for the "new rule" jurisprudence -- finality, predictability, and comity -- are undermined "to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." Stringer v. Black, __ U.S. __, 112 S. Ct. 1130, 1135 (1992); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 1214 (1990).

In addressing the Teague claim, this Court failed to apply various aspects of Teague. First, this Court does not "dictate" precedent to the Arizona Supreme Court concerning constitutional interpretation, therefore Smith cannot be used as mandating a procedure to the State of Arizona. See Stringer v. Black, 112 S. Ct. at 1140. Second, as other panels of this Court have specifically rejected the "teachings of Lockett and Eddings" as found in Smith, it is clear that those United States Supreme Court cases do not "dictate" that the Arizona Supreme Court was wrong in the instant case. Saffle v. Parks, 110 S. Ct. 1257, 1259-60 (1990); Butler, 110 S. Ct. at 1214; Greenawalt v. Ricketts, 943 F.2d 1020 (1991). Finally, the majority stated under Beam it was required to apply Smith in this case even if Smith was a new rule. Slip op. at 11 n.4. Such a holding is clearly in violation of Teague. Arizona cannot be bound by a case in which it was

not a party. Montana's failure to argue Teague may be a waiver in that case.[5] However, under Teague the inquiry is whether the Arizona courts correctly applied the existing law in the case sub nom, not whether Montana waived the claim in some other case. This Court should reconsider its opinion on this point also.

CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to reconsider its opinion and suggests that rehearing en banc is appropriate.

DATED this 12th day of September, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

---

5. See Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990).

CERTIFICATE OF SERVICE

TWO COPIES of this Petition were deposited for mailing this 12th day of September, 1992, to:

DONALD S. KLEIN
FRANK P. LETO
32 North Stone, Fourth Floor
Tucson, Arizona 85701
Attorneys for PETITIONER-APPELLANT

/S/
JANET E. DYER
Administrative Assistant
Criminal Appeals Section
1275 West Washington, 1st Floor
Phoenix, Arizona 85007

HC5-174

2196d/jd